


Because Breaking Up Is Hard to Do: Some Things to Consider When Changing Firms

By Jennifer Milne and Robert Marsh

Perhaps more than ever before, attorneys today are both willing and able to move between firms or form new firms to fit their interests and personalities. As a result, more and more of us are confronting the many legal, ethical, and practical considerations that impact an attorney's departure from one position and beginning of another. Whether that happens as a young associate or a seasoned partner, such transitions raise a host of issues depending upon the specific circumstances.

In addition, in many cases, after a move to a new law firm, an attorney will be competing with his or her former employer. So, when the employer finds out that an attorney is leaving, there will be concerns about the attorney continuing to interact with clients and the possibility that clients will follow the departing attorney to the new firm. Before pulling the trigger on a move, any attorney should consider the possibility that the announcement of departure will result in an immediate termination, and it makes good sense to prepare for that eventuality before broaching the issue with your employer or partners.

This article is not meant to be a comprehensive guide to leaving a law practice or starting your own firm. Instead, we hope only to bring to your attention a few things that, in an ideal world, you can think about and plan to address before stepping into that shareholder's meeting or partner's office to inform them of your imminent departure.

The Cardinal Rule: Get Independent Advice

The old saying goes that: "an attorney representing himself has a fool for a client." That is never more true than when leaving an existing firm to join or form a new one, and particularly if any clients may be making the move with you.

Leaving a job is all about putting yourself in a better situation, and consequently, it directly involves your personal goals and interests. You cannot become so focused on your own interests, however, that you lose sight of the fact that attorneys are fiduciaries of their clients,[1] owe duties of loyalty to their employers,[2] and may owe fiduciary duties to each of the other members of a firm.[3] In many situations, these duties require an attorney to set aside his or her personal and/or business interests, and create a complicated web of divided and potentially conflicting loyalties in which a misstep could forfeit your right to be paid for your work or, worse yet, get you sued or disciplined for a violation of professional ethics.[4]

So, when sitting down to plan your next professional move, be sure to set aside your ego and any assumption that your license to practice law makes you just as qualified as anyone else to find the answers to what may be a long list of questions. Then, find someone you trust to help you work through the issues. A little independent advice from a friend or mentor that has been through the process, or another experienced and trusted advisor, can go a long way toward keeping you out of trouble.

An Employee's Duty of Loyalty and Privilege to Prepare to Compete

One of the first issues that you may confront is what you can or cannot do before telling your employer that you are leaving. Regrettably, there are few bright-line answers to that question.

Employees functioning as agents of their employer owe their employers a duty of loyalty, and members or managers of a law practice are fiduciaries of both the firm and the other members of the firm.[5] Whether or not any particular position gives rise to an "agency" relationship and the corresponding duty of loyalty is a question of fact. A few considerations applied in addressing that issue, however, are the employee's degree of supervisory authority and client contact.[6]

Where a duty of loyalty exists, it requires an employee to act solely in the interests of the employer in all matters related to their employment. An employee may prepare to compete with the employer, by, for example, locating a new office space or interviewing with other businesses. The employee may even tell clients of their impending departure.[7] Such preparations, however, may not result in any actual competition with the employer. The duty of loyalty also prevents an employee from (1) asking existing clients to move their business to another firm, (2) soliciting or directing new clients to the new firm, or (3) soliciting co-workers to move to a new firm.[8]

What constitutes impermissible competition or solicitation, as opposed to mere preparations to compete, depends upon the totality of the circumstances and the employee's actions. Therefore, the boundary of what pre-departure actions are permissible is poorly defined. Factors to be considered in determining whether an employee's actions are merely preparatory or constitute a breach of loyalty include:

- The nature of the employment relationship;
- The impact or potential impact of the employee's action on the employer's operations; and
- The extent of any benefits promised, or inducements made, to co-workers to obtain their services for the competing business.[9]

The Colorado Supreme Court has also indicated that issues involving an alleged breach of an employee's duty of loyalty should be given a flexible approach to accommodate so-called "traditional actions of departing employees." For example, despite the general prohibition of soliciting co-workers to leave a firm, the Colorado Supreme Court's decision in *Jet Courier Service, Inc. v. Mulei*, notes that:

> [T]raditional actions by departing employees, such as the executive who leaves with her secretary…or the firm partner who leaves with associates from her department, would not give rise to a breach of the duty of loyalty unless other factors, such as an intent to injure the employer in the continuation of his business, were present.[10]

Accordingly, an employee's duty of loyalty is not so inflexible as to prevent any discussion at all among colleagues of an impending departure, and the question of just what is permissible in that regard is more a matter of degree and intent than any absolute prohibition.

Nevertheless, exercise caution when considering these issues, because the consequences of being wrong could be severe. For example, Colorado law enables an employer to recover compensation paid to an employee for any period during which the employee breached his or her duty of loyalty, and even an unsuccessful solicitation of a client or co-worker supports a claim for breach of the duty.[11] Consequently, careless communications may forfeit an employee's right to compensation already paid, even if they do not actually damage the employer by causing a client or co-worker to leave a firm.

Notifying Clients

Once your impending departure has been raised with your employer, the next question is, inevitably, which clients must be told that you are leaving and what exactly to tell those clients.

Colo. RPC 1.4 requires a lawyer to keep clients "reasonably informed about the status of a matter" and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." These obligations apply to a client's choice of counsel and require notice to clients when an attorney that has "played a principal role" in the representation leaves a firm.[12] In many cases, it will be easy to tell whether an attorney has had a principal role in a case. In others there may be questions. The issue, however, is not one of title or seniority. An associate or second chair attorney may play a principal role in a particular client's representation, which would require notice of that associate's departure and the client's choice of counsel.

The Ethics Committee of the Colorado Bar Association has developed a form notice to clients that may suffice in many circumstances—or may at least provide a good template to work

from. A joint communication from the firm and the departing lawyer is "highly preferable,"[13] and as a matter of law independent of the rules of ethics, attorneys owe their clients fiduciary duties of candor and full disclosure that require disclosure to clients of anything known to the attorney that may be "material" to the client's representation.[14] Both the firm and the departing attorney are required to offer the client enough information to enable the client's informed selection of counsel.[15] Consequently, it is not uncommon for issues to arise concerning what can or must be said in a notice to clients. A departing attorney or the firm may have concerns about the other's competence to continue handling a certain case or type of cases as a result of a lack of experience, expertise, or resources. Indeed, even the personal lives of the attorneys involved could be at issue. For example, perhaps an attorney has a history or pattern of substance abuse, is going through a contentious divorce, or is dealing with other family crises that could be a distraction from the client's case.

Whether any of these circumstances is "material" to the client's choice of counsel, and therefore must be disclosed, depends upon whether an objectively reasonable person would consider the information significant.[16] Colorado case law indicates, however, that circumstances that do not adversely affect the quality of an attorney's representation are not material to the choice of counsel and, therefore, need not be disclosed to clients. Likewise, before any obligation of disclosure arises, the risk of an adverse impact on an attorney's work must rise above the level of mere speculation.[17]

Both the departing attorney and the firm must bear in mind that their notice to clients is both a communication to a client regarding an existing matter and a form of solicitation of business. Accordingly, the notice should be sufficiently detailed to enable the client's fully informed decision without disparaging either the departing attorney or firm, and must also be free from any false or misleading statements about any attorney's services.[18] In addition, an attorney must not solicit matters that the attorney is not competent to handle or cannot promptly become competent to handle by study or association with another experienced attorney.[19]

Finally, it is of paramount importance that the client's legal representation not suffer throughout the transition. Accordingly, both the law firm, the departing attorney, and the client should remain reasonably informed about material and upcoming deadlines in the client's matter and the attorneys should take reasonable steps to ensure that no deadlines are missed, and the client is not somehow left without representation to his or her detriment at any time.

Fee Splits on Contingency Cases

If you take any pending contingency fee matters with you to your new practice, you may also have to wrestle with the questions of whether, when, and how to divide any fee eventually earned between the old firm and the new firm.

The first thing you will want to do at your new firm is to have a new fee agreement signed between the clients who choose to follow you and your new firm.[20] Remember that no harm should come to your client as a result of your change in employment. So, the safest route is to continue to represent your client under the same terms and conditions (primarily, the same contingency percentage) that the client agreed to with your former firm. You should also consider assuring your client that he or she will not be charged multiple contingent fees, and that any split of the fees will be determined as between the two firms.

The fact that a client followed you to a new firm does not mean that your former firm is not entitled to compensation for work done (even by the departing lawyer) while it represented the client. Whether the former firm may collect a fee from the client, however, will depend on whether its contingency fee agreement contained an appropriate and enforceable transition clause.[21] If so, the former firm's entitlement to compensation directly from the client may also enable it to assert an attorney's lien against the client's papers or any fees ultimately earned on the case. Nevertheless, attorneys should carefully research the limitations and requirements of such liens before asserting one, and should be hesitant to take any actions that may negatively impact the client's interests or a pending contingency fee matter.[22] Further, even if an attorney's former firm is not entitled to seek compensation directly from the client, the firm likely will not be prohibited from seeking compensation from the departing attorney and/or the attorney's new firm.[23]

The easiest (and often most cost-effective) way to handle fee splits between law firms is to reach an agreement with your old firm before your departure. Courts generally will not disturb a compensation agreement put in place between lawyers so long as the total fee to be collected from the client is not unreasonable, and several courts have held that the Colorado Rules of Professional Conduct do not apply to such agreements.[24] This can help you avoid time-consuming and often contentious litigation.

However, the ideal situation is not always practical, and often attorneys do leave employment, taking clients with them, without having reached an

agreement on fee splits. Under these circumstances, if litigation ensues, a judge will likely consider several factors to determine which firm is entitled to what percentage. These factors may include:

- How long each case was with each firm;
- How many hours each firm spent providing services on the case;
- The relative costs advanced by each firm; and,
- What stage the case was in at the time the lawyer departed and what work was done by each firm.

A court may also take the approach of calculating the lodestar amount for services provided by the former law firm and award that amount. Any of these initial calculations may then be adjusted according to the factors set forth in Colo. RPC 1.5 or any other factors identified by an expert testifying for either firm.[25]

File Retention and Transfer

Another aspect of an attorney's transition from one place of employment to another involves questions of intellectual property, proprietary information, and ownership of work product. Unfortunately, what an attorney or firm may think of as "belonging" to him, her, or it may not legally, or ethically, be the attorney's or firm's property.

With very limited exceptions, clients own their files. Accordingly, the client has a right to access certain portions of his/her file, and lawyers are ethically required to protect the client's interests.[26] If a client chooses to continue its representation with the departing lawyer, the law firm must immediately provide a copy of the necessary portions of the file to the departing lawyer upon demand.

The departing attorney may also have a right to copy certain portions of a client's file who has chosen to continue legal representation through the firm from which the attorney is departing. For example, where the attorney departs employment before the client has made an election, the Colorado Rules of Professional Conduct dictate that both the lawyer and the law firm should retain reasonable access to the file to continue to protect the client's interests.[27]

In other circumstances, the departing attorney's right to copy materials from the firm may be limited to those materials in which the attorney has an interest or those materials that the departing attorney prepared. For example, an attorney who played a principal role in a particular client's representation may need to defend against a future malpractice claim and/or grievance related to that matter.[28] Other materials, such as a client list or internal memoranda and templates, may be considered proprietary or trade secret information belonging to the law firm that cannot be taken or copied without the firm's consent.[29] In most cases, whether or not particular material constitutes proprietary or trade secret information of the company will be subject to a very fact-intensive inquiry. However, under all circumstances, the contents of the client's file should be kept confidential pursuant to Colorado Rule of Professional Conduct 1.6.[30]

To avoid any potential disputes, civil liability, or ethical dilemmas, best practices dictate that the safest route is to ask your former employer's consent to copy the materials you are interested in taking with you.

Conclusion

At a fundamental level, every attorney's practice is built on relationships with clients and colleagues. Like all relationships, changing or ending those professional connections can be a difficult experience on many levels. The pieces of that puzzle identified above are just a few of the many complicated legal, practical, and ethical issues involved. So, if you are considering a change in your practice, take the time to think about and prepare for the potential issues, and get some independent advice from a qualified and trusted advisor. In the end, you will be glad that you did, and may even be rewarded with a seamless transition that protects all the many relationships that are the foundation of your existing practice and will sustain it into the future. ▲▲▲

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Endnotes:

[1] *Moye White LLP v. Beren*, 320 P.3d 373, 377 (Colo. App. 2013); *cert. denied*, 2014 WL 621724 (Colo. 2014) (addressing an attorney's common law and ethical obligations of disclosure to clients).

[2] *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486 (Colo. 1989) (employee's duty of loyalty).

[3] *LaFond v. Sweeney*, 345 P.3d 932, 939 (Colo. App. 2012) (fiduciary duties among members of a law firm).

[4] *See, e.g., Jet Courier,* 771 P.2d at 499 (acknowledging the general rule that an agent is not entitled to compensation for any period during which he breached his

duty of loyalty regardless of whether some of his services rendered in that period were competently provided).

[5] *See generally Jet Courier*, 771 P.2d 486 *and LaFond,* 345 P.3d 932.

[6] *See, e.g., Graphic Directions, Inc. v. Bush*, 862 P.2d 1020, 1023 (Colo. App. 1993).

[7] *Id.*

[8] *Jet Courier*, 771 P.2d at 494, citing *Community Counseling Serv., Inc. v. Reilly*, 317 F.2d 239, 244 (4th Cir. 1963) for the proposition that, when notice of departure precedes the termination of employment, and a client initiates a discussion of moving their matter to the new firm, the attorney must decline to discuss it at that time.

[9] *Jet Courier*, 771 P.2d at 497.

[10] *Id.* at 497, n. 13.

[11] *Id.* at 497-99.

[12] Colo. RPC 1.4(b); CBA Formal Ethics Opinion 116: *Ethical Considerations in the Dissolution of a Law Firm or a Lawyer's Departure from a Law Firm* (March 17, 2007).

[13] CBA Formal Ethics Opinion 116.

[14] *Moye White LLP v. Beren*, 320 P.3d 373, 378 (Colo. App. 2013).

[15] *See* ABA Formal Opinion 99-414; Alexander R. Rothrock, Essays on Legal Ethics and Prof. Conduct A4.2.1 (CLE in Colorado, Inc. 2005).

[16] *Moye White*, 320 P.3d at 378-79.

[17] *Id.*

[18] Colo. RPC 7.1(a) ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.").

[19] CBA Formal Ethics Opinion 76: *Lawyer Advertising Guidelines* (Oct. 17, 1987).

[20] Colo. RPC 1.5, cmt [2].

[21] *See, e.g.*, *Elliott v. Joyce*, 889 P.2d 43, 45 (Colo. 1994); *Dudding v. Norton Frickey & Assocs.*, 11 P.3d 441, 444 (Colo. 2000); Colo. R. Civ. P. 23.3, comm. cmt.

[22] *See, e.g.*, C.R.S. §§ 13-93-114 to -115; CBA Formal Ethics Ops. 82, 104, 110.

[23] *See, e.g.*, *Accident & Injury Med. Specialists, P.C. v. Mintz*, 279 P.3d 658, 664 (Colo. 2012) (The Colorado Rules of Professional Conduct do not serve as a basis for civil liability); *Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.*, 287 P.3d 842, 848 (Colo. 2012) ("Chapter 23.3 does not purport to impose restrictions on fee sharing agreements or equitable recovery between attorneys."); *Law Offices of J.E. Losavio, Jr. v. Law Firm of Michael W. McDivitt, P.C.*, 865 P.2d 934, 936 (Colo. App. 1993) ("An attorney who…is terminated by a client without cause is entitled to compensation for the services rendered. Recovery in such instances is on the theory of quantum meruit.").

[24] *Id.*

[25] *See generally Mintz*, 279 P.3d 658; *Melat*, 287 P.3d 842; *Losavio*, 865 P.2d 934.

[26] *See* RPC 1.16(d); CBA Formal Ethics Opinion 104 (further defining and addressing the parts of a client file that must be produced immediately upon demand and those portions of the file that may be withheld by the attorney whose representation was terminated); CBA Formal Ethics Opinion 116 (discussing the production of client files upon termination of representation and withdrawal of lawyers from representation).

[27] *See* CBA Formal Ethics Opinion 116, App. A, ABA Formal Opinion 99-414.

[28] *See id.*

[29] *See* CBA Formal Ethics Opinion 116, Appendix A - ABA Formal Opinion 99-414; *see also, e.g.*, *Sonoco Prod. Co. v. Johnson*, 23 P.3d 1287, 1288 (Colo. App. 2001) (referencing trial court's holding that former employee's taking of manufacturing technology and parts, floppy disks, manuals, a videotape of the manufacturing process, customer lists, and pricing information upon termination of employment constituted misappropriation of trade secrets).

[30] *See id.*